

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOHN A. BOWYER,

Petitioner,

vs.

CRAIG FARWELL, *et al.*,

Respondents.

3:04-cv-00654-LRH-RAM

ORDER

This action proceeds on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, by petitioner John Bowyer, a Nevada prisoner. Before the Court is respondents' motion to dismiss (docket #37).

I. Procedural History

Petitioner was charged on May 25, 2001, with first degree kidnapping (count I), three counts of sexual assault (counts II-IV), and solicitation to commit murder (count V) for offenses committed against his mentally disabled adult niece. Exhibit 4.¹ After a jury trial, petitioner was convicted on June 8, 2001 of one count of sexual assault (count III) and solicitation to commit murder, and acquitted of the remaining charges. Exhibit 8G. The District Court for Clark County sentenced petitioner on July 30, 2001, to life imprisonment with the possibility of parole in ten years for count II and to a minimum of 26 months and a maximum of 120 months for count V. Exhibit 8H. The court entered a judgment of conviction on August 21, 2001. Exhibit 9.

¹ The exhibits cited in this order are those filed by respondents in support of the first motion to dismiss, and are located in the record at docket #16 and 17.

1 Petitioner appealed, and the Nevada Supreme Court affirmed his convictions. Exhibit 13.
2 Petitioner then mailed a habeas corpus petition to the district court on October 7, 2003. Exhibit A.²
3 The petition contains ineffective assistance of counsel claims, ineffective assistance of appellate
4 counsel claims, claims of trial court error, and the grounds that were raised on direct appeal. *Id.*
5 The district court denied the petition without holding an evidentiary hearing. Exhibit 14.

6 The Nevada Supreme Court affirmed the lower court's denial on October 4, 2004. Exhibit
7 16. The court addressed eight of petitioner's ineffective assistance of counsel claims on the merits,
8 and denied the balance of the twenty additional ineffective assistance claims as conclusory or devoid
9 of factual support. *Id.* at 6. The court also noted that petitioner's arguments that appellate counsel
10 was ineffective were also lacking in factual support, but the court concluded that petitioner failed to
11 establish that an appeal of any of the issues raised would not have had a reasonable likelihood of
12 success. *Id.* at 7-8. Next the court addressed petitioner's claims of trial court error, finding that the
13 claims were outside the scope of a post-conviction petition for a writ of habeas corpus. *Id.* at 8.
14 Finally the court stated that the law of the case doctrine barred the court from addressing the claims
15 that had been previously raised on direct appeal. *Id.* at 8-9.

16 On October 19, 2004, petitioner mailed his federal habeas petition to this Court (docket #7).
17 After filing an amended petition that raised four grounds for relief (docket #10), respondents moved
18 to dismiss the petition, arguing grounds one, two and four were unexhausted (docket #15). This
19 Court found grounds one and four to be unexhausted (docket #18). Petitioner elected to abandon
20 those claims (docket #19). Respondents filed an answer to the remaining claims (docket #22), but
21 prior to a merits determination, petitioner moved to amend his petition (docket #33). This court
22 granted petitioner leave to file a second amended petition for a writ of habeas corpus (docket #35).

23 Petitioner filed his second amended habeas corpus petition, alleging fifteen grounds for relief
24 (docket #36). Ground five contains approximately thirty-one sub-claims, (a) through (ee), ground six
25 contains sub-claims (a) through (i), ground eight contains sub-claims (a) through (c) and ground ten

27 ² Exhibit A, located in the record at docket #31, contains petitioner's state habeas corpus petition
28 that was filed in response to this court's order granting petitioner's motion to compel production of the
record (docket #29).

contains sub-claims (a) through (e). Respondents moved to dismiss claims 5(a), (c), (d), (e), (f), (h), (i), (j), (k), (l), (m), (n), (o), (p), (r), (s), (t), (v), (x), (y), (aa), (bb), (cc), (dd), 8(a), 8(c), 9, 10(a), 10(d), 10(e), 11, 13 and 14, arguing those claims were procedurally defaulted in the state court (docket #37). Moreover, respondents contend that claims 6(a) through (i) should be dismissed as the claims are unsupportable by factual allegations and are unanswerable. *Id.* Petitioner opposes the motion to dismiss (docket #42).

II. Procedural Default

A. General Principles

Generally, in order for a federal court to review a habeas corpus claim, the claim must be both exhausted and not procedurally barred. *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003). Procedural default refers to the situation where a petitioner in fact presented a claim to the state courts but the state courts disposed of the claim on procedural grounds rather than denying the claim on the merits. A federal court will not review a claim for habeas corpus relief if the decision of the state court regarding that claim rested on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). The *Coleman* Court stated the effect of a procedural default as follows:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986).

To demonstrate cause for a procedural default, the petitioner must be able to “show that some objective factor external to the defense impeded” his efforts to comply with the state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment must have prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

With respect to the prejudice prong of cause and prejudice, the petitioner bears:

the burden of showing not merely that the errors [complained of] constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire [proceeding] with

errors of constitutional dimension.

White v. Lewis, 874 F.2d 599, 603 (9th Cir. 1989) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)). If the petitioner fails to show cause, the court need not consider whether the petitioner suffered actual prejudice. *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982); *Roberts v. Arave*, 847 F.2d 528, 530 n.3 (9th Cir. 1988).

B. Application to the Instant Case

In this case, some of petitioner's claims were procedurally defaulted. On the appeal from the denial of petitioner's state-court habeas petition, the Nevada Supreme Court addressed eight of petitioner's claims on the merits. The claims addressed in that court correspond to claims 5(b), 5(g), 5(q), 5(u), 5(w), 5(z), 7, 10(c), and 10(d) contained in petitioner's federal habeas petition. The trial court then stated:

Bowyer raised approximately twenty additional claims of ineffective assistance of trial counsel that were completely devoid of specific factual support. [fn 17: *See Hargrove*, 100 Nev. At 502, 686 P.2d at 225] Because Bowyer did not adequately articulate how his counsel was ineffective with respect to these claims, the district court did not err in denying him relief.

....

Bowyer next claimed that: (1) the district court made disparaging remarks and was personally biased; (2) there was insufficient evidence that he committed sexual assault; (3) the district court and the prosecutor committed cumulative error; (4) the jury instructions were legally invalid and incomprehensible; (5) the testimony of an unqualified state was unreliable; (6) this court did not conduct a fair and adequate review of his direct appeal; (7) his constitutional rights were violated by the misconduct and bias of a juror; and (8) his rights were violated by a paid police informant. These claims are outside the scope of a post-conviction petition for a writ of habeas corpus, and should have been raised on direct appeal. [fn 22: *See NRS 34.810(1)(b)(2)*.] Further, Bowyer did not include specific facts to support these claims. [fn 23: *See Hargrove*, 100 Nev. At 502, 686 P.2d at 225.] Thus, the district court did not err in denying him relief.

Exhibit 16.³

³ The approximately twenty additional claims of ineffective assistance of counsel correspond to petitioner's claims 5(a), 5(c) through (f), 5(h) through (p), 5(r) through (t), 5(v), 5(x), 5(y), 5(aa) through (dd), and claims 8(a) and (c), raised in the instant petition. The eight claims of trial court error raised below correspond to petitioner's claims 8(b), 10(a), (d) and (e), claim 9, claim 11 and claims 13 through 15.

For the procedural default doctrine to apply, “a state rule must be clear, consistently applied, and well-established at the time of the petitioner’s purported default.” *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994). *See also Calderon v. United States District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996).

1. Conclusory or Factually Unsupported Claims

Respondents assert that Nevada’s “procedural rule” that claims must be supported by specific factual allegations as opposed to pleading naked or bald assertions, was well-established, adequate and independent at the time it was applied to petitioner’s conclusory claims. Petitioner argues that the Nevada Supreme Court did not procedurally bar any of his claims and instead addressed the merits of each of his claims.

The Court is not persuaded on the showing and argument made and based upon the authorities cited that a denial for lack of pleading specificity is a basis for procedural default. The Nevada Supreme Court did not refrain from reviewing the claims, as is the case with procedural default, but instead reviewed each claim and determined the claims were insufficient and did not warrant state post-conviction habeas relief. The motion to dismiss, with respect to claims 5(a), 5(c) through (f), 5(h) through (p), 5(r), 5(s), 5(t), 5(v), 5(x), 5(y), 5(aa) through (dd) and claims 8(a) and (c) will be denied.

2. NRS 34.810(1)(b)(2)

Petitioner argues, as was previously noted, that the court did not refrain from reviewing his claims on procedural grounds. This contention, with respect to some of petitioner’s claims, is incorrect. The Nevada Supreme Court stated that petitioner’s claims of trial court error were outside the scope of the post-conviction writ as they could have been raised on direct appeal. Exhibit 16. The court cited to NRS 34.810(1)(b)(2). *Id.*

The Ninth Circuit Court of Appeals has held that, at least in non-capital cases, application of NRS 34.810 is an independent and adequate state ground. *See Vang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003); *Bargas v. Burns*, 179 F.3d 1207 (9th Cir. 1999). This Court finds that the Nevada Supreme Court’s holding that review of petitioner’s claims of trial court error was barred pursuant to NRS 34.810 is an adequate and independent ground. Petitioner’s opposition

contains no arguments relating to “cause” for the procedural default, therefore grounds 8(b), 10(a), 10(d), 10(e), 9, 11, 13, 14 and 15 shall be dismissed.

III. Sufficiency of Claims Contained in Ground 6

Respondents argue that claims 6(a) through (i) should be summarily dismissed as they are “single-sentence claims” that are unsupported by factual allegations and as such are unanswerable.

A petitioner claiming ineffective assistance of appellate counsel must demonstrate that counsel was deficient or his performance fell below an objective standard of reasonableness, and that this deficiency prejudiced the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668 (1984); *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002) (stating that claims of ineffective assistance of appellate counsel use the same standard announced in *Strickland*).

Petitioner’s claims in ground six contain only conclusory assertions about appellate counsel’s performance. Petitioner fails to specifically outline the errors that allegedly occurred at trial and what appellate counsel should have done differently. Moreover, petitioner does not allege how counsel’s failure to raise these issues on appeal affected the outcome of his direct appeal. Conclusory allegations not supported by a statement of specific facts do not warrant habeas corpus relief. *See Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994). Furthermore, the failure to allege specific facts that support a claim renders the claim conclusory on its face and subject to dismissal for failure to state a claim. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Thus the motion to dismiss with respect to grounds 6(a), 6(b), 6(c), 6(d), 6(e), 6(f), 6(g), 6(h) and 6(i) will be granted and these claims will be dismissed.

IT IS THEREFORE ORDERED that respondents’ motion to dismiss (docket #37) is **GRANTED IN PART AND DENIED IN PART**. The Court finds Grounds 8(b), 10(a), 10(d), 10(e), 9, 11, 13, 14 and 15 were procedurally defaulted in state court, and that petitioner has not made a showing of cause for that procedural default. The Court also finds Grounds 6(a), 6(b), 6(c), 6(d), 6(e), 6(f), 6(g), 6(h) and 6(i) are conclusory claims that do not warrant federal habeas corpus relief.

IT IS FURTHER ORDERED that Grounds 6(a), 6(b), 6(c), 6(d), 6(e), 6(f), 6(g), 6(h), 6(i), 8(b), 10(a), 10(d), 10(e), 9, 11, 13, 14, and 15 of the Second Amended Petition are **DISMISSED**.

1 **IT IS FURTHER ORDERED** that respondents shall have sixty days from the date of entry
2 of this order, to file and serve an **Answer** to the claims remaining in the Second Amended Petition.

3 DATED this 9th day of May, 2008.

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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE